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In the Supreme Court of the United States.

OCTOBER TERM, 1975.

No. 75-3401

CHESTER BRODERICK ET AL.,
PETITIONERS,

v.

ROBERT J. DI GRAZIA,
RESPONDENT.

Petition for a Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts.

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BATEMAN & SLADE, INC., BOSTON, MASSACHUSETTS.

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CHESTER BRODERICK ET AL.,
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ROBERT J. DI GRAZIA,
RESPONDENT.

Motion for Leave to File Petition for Writ Of Certiorari.

Now come the petitioners and respectfully move this Court for leave to file the annexed petition for writ of certiorari under § 1257(3) of Title 28, United States Code, directed to the Supreme Judicial Court of Massachusetts, to review an order and judgment of that court entered on June 4, 1975, and more particularly described in the petition, and for such other and further relief as may be just and proper.

Respectfully submitted,

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In the Supreme Court of the United States.

OCTOBER TERM, 1975.

No.

CHESTER BRODERICK ET AL.,
PETITIONERS,

v.

ROBERT J. DI GRAZIA,
RESPONDENT.

Petition for a Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts.

The petitioners, Chester J. Broderick, John F. Bilodeau, and Paul J. Whelan, police patrolmen in the city of Boston, and officers of the duly certified collective bargaining agent for all

Boston police patrolmen, pray that a writ of certiorari issue to review the opinion and judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts rendered in these proceedings on June 4, 1975.

Opinions Below.

The opinion of the Supreme Judicial Court, as yet unreported, appears at Appendix B, *infra*, pp. 17-28. The opinion of the Superior Court of Suffolk County is unreported, and appears at Appendix A, *infra*, pp. 9-15.

Jurisdiction.

The judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts (Appendix A, *infra*) was rendered on June 4, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Questions Presented.

1. Whether the action of the Supreme Judicial Court of Massachusetts in affirming the judgment of the Superior Court in holding that petitioners who are police officers in the city of Boston, must provide written answers to a number of writ-

ten questions concerning off-duty non-criminal conduct addressed to the officers by the respondent infringes petitioners' Fifth Amendment privilege against self-incrimination — particularly in the light of the standards set forth by this Court in *Gardner* v. *Broderick*, 392 U.S. 273 (1968), wherein it was held that police officers must answer questions only if they "specifically, directly, and narrowly relat[e]" to the performance of their official duties.

2. Whether the right of privacy as set forth by this Court as a constitutional right in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), and as provided for in Mass. General Laws, c. 214, § 1B (1973), has been violated by the action taken by the Supreme Judicial Court of Massachusetts.

Constitutional Provisions Involved.

CONSTITUTION OF THE UNITED STATES, AMENDMENT V.

"No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

MASSACHUSETTS GENERAL LAWS, CHAPTER 214, § 1B.

"A person shall have a right against unreasonable, substantial or serious interference with his privacy. The superior court shall have jurisdiction in equity to enforce such right and in connection therewith to award damages."

Statement of the Case.

The facts in this case are not disputed. Petitioners and other members of the Boston police force were invited by various Rhode Island police officers to attend the Law Day celebration in Newport, Rhode Island, during the weekend of May 10, 1974. All of the petitioners, and those other patrolmen who attended, were off-duty and travelled to Newport by transportation of their own arrangement. In Newport, the petitioners met with members of 28 other police departments and discussed matters of common concern. There was a Law Day parade in Newport on Saturday, May 11, 1974, in which, for the only time during the weekend, the petitioners and others in their contingent wore their police uniforms.

After petitioners' return to Boston, a complaint was made to the Internal Affairs Division, Boston Police Department, by the manager of the Ramada Inn, Newport, Rhode Island, alleging that certain unknown persons had caused disturbances and damage to his motel. Based upon this complaint, the respondent caused to be made up and distributed a questionnaire directed to 140 patrolmen, including petitioners, whom time records showed to be in an off-duty status on the days in question. The petitioners were instructed that the questionnaire was to be answered under pain of dismissal or other disciplinary action. Deputy Superintendent Barry of the Internal Affairs Division of the Boston Police Department testified that he had no evidence that any person who attended that weekend was in an on-duty status with the Boston Police Department. He further testified that persons were named as being there who definitely were not there and that the verified complaint concerned only the alleged activity at the motel and nothing at the parade. Deputy Superintendent Barry further testified that if any man had been injured while in Portsmouth, Rhode Island, he would not have been compensated by the department.

On May 29, 1974, petitioners filed a petition in the Superior Court, Suffolk County, Massachusetts, seeking declaratory and injunctive relief regarding the questionnaire issued by the respondent. On May 29, 1974, the respondent was enjoined from requiring the petitioners and others from providing the information requested in the questionnaire. Following a denial of the respondent's demurrer, and a trial on the merits, the Superior Court entered an order dissolving the preliminary injunction and ruling that the information ordered provided by the respondent was reasonable and within his authority, that the request was constitutional, and that it did not violate the petitioner's rights of privacy. A copy of the court's opinion is attached to this application as Appendix A. On June 4, 1975, the Supreme Judicial Court rendered an opinion, attached hereto as Appendix B, which affirmed the judgment of the Superior Court.

On July 21, 1975, petitioners attempted to file with the Clerk of the Supreme Judicial Court an application for a stay of rescript and judgment pending further appeal to this Court by way of a petition for a writ of certiorari. The application was not accepted for filing on the ground that such a procedure was unknown to personnel in the Clerk's office. On July 22, 1975, the respondent, by counsel, moved for entry of judgment pursuant to the opinion of the Supreme Judicial Court and said motion was granted by the Superior Court, Suffolk County.

On August 8, 1975, the Supreme Judicial Court, by Quirico, J., denied the petitioners' application for a stay of rescript and judgment which had earlier been refiled.

On August 12, 1975, petitioners, pursuant to 28 U.S.C. § 2101(f), filed an application for a stay of rescript and judgment of the Supreme Judicial Court of Massachusetts in the Supreme Court of the United States. On August 14, 1975, Justice William J. Brennan, Jr., denied petitioners' application for a stay.

Reasons for Granting the Writ.

1. The Conflict Between the Decision Below and This Court's Decisions in Gardner v. Broderick, 392 U.S. 273 (1968), and Garrity v. New Jersey, 385 U.S. 493 (1967).

At the outset, it is agreed that any public employee may, under threat of discharge, be obligated to answer questions which "specifically, directly, and narrowly relat[e] to the performance of his official duties." *Gardner* v. *Broderick*, 392 U.S. 273, 278 (1968). The Supreme Judicial Court of Massachusetts, however, read the opinion of this Court in the *Gardner* case, *supra*, to stand for the unprecedented proposition that an employer may inquire of public employees concerning their off-duty conduct under pain of disciplinary proceedings if the inquiry has a relation generally to the officer's fitness and ability to serve in governmental service (Appendix B, p. 20). This is an unwarranted extension of the *Gardner* ruling, and creates a virtually boundless and subjective power in the employer to coerce responses from the employees under pain of discharge or other disciplinary action. The scope of this ruling invites general inquiry into the private life of public employees, and implies that, because of their status, these individuals have become second-class citizens. This Court has recently denied certiorari where a state court had held illegal the discharge of a fire captain who had asserted his Fifth Amendment privilege against self-incrimination and had refused to answer any *questions* in the course of a murder investigation that *did not relate to performance of official duties*. *Cox* v. *City of Chattanooga*, 516 S.W. 2d 94 (Ct. App. Tenn. 1973), cert. den. sub nom. *City of Chattanooga* v. *Cox*, 419, U.S. 833 (1974).

2. Conflict Between Decisions of the Federal Courts and the Decision Below with Regard to the Protected Sphere of Private Conduct of Public Employees.

In the decision below, the Supreme Judicial Court of Massachusetts defined the permissible scope of official inquiry to encompass purely private, off-duty conduct without a *prima facie* showing that the conduct has any relation to the ability of a specific individual to perform a specific job-function. This holding is in direct conflict with federal decisions such as *Gardner* v. *Broderick, supra; Norton* v. *Macy*, 417 F. 2d 1161 (D.C. Cir. 1969); *Gayer* v. *Laird*, 332 F. Supp. 169 (D. D.C. 1971); *Mindel* v. *United States Civil Service Commission*, 312 F. Supp 485 (N.D. Cal. 1970). This conflict should be resolved in order to effectuate the orderly administration of pending and future litigation in this area of concern.

3. The Conflict Between the Opinion of the Court Below and This Court's Opinion in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965).

In the *Griswold* case, *supra*, this Court articulated a general right of privacy as an emanation from or necessary incident to the other express provisions of the Bill of Rights. Subsequently, in a number of other cases in this Court, this principle has been relied upon for the resolution of other disputes. *See, e.g., Roe* v. *Wade*, 410 U.S. 113 (1973). The Massachusetts Legislature in 1973 (St. 1973, c. 941) enacted a right of privacy into its General Laws (Mass. General Laws, c. 214, § 1B). The decision of the Supreme Judicial Court of Massachusetts brushed aside in summary fashion the petitioners' claims of a protected sphere of off-duty, non-job related conduct which may not legitimately be invaded. This conflict should be re-

solved and guidelines articulated by this Court. While noting that "a police officer [need not] be required, on penalty of dismissal, to answer every inquiry directed to his conduct while off duty" (Appendix B. p. 26), the Court below proceeded to impose such a requirement in the present case.

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Massachusetts Supreme Judicial Court.

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Appendix A.

COMMONWEALTH OF MASSACHUSETTS.

SUPERIOR COURT.

SUFFOLK COUNTY. EQUITY No. 99514.

CHESTER J. BRODERICK, JOHN F. BILODEAU
AND PAUL J. WHELAN
INDIVIDUALLY AND AS PATROLMEN IN THE CITY OF
BOSTON POLICE DEPARTMENT

vs.

ROBERT J. DI GRAZIA,
POLICE COMMISSIONER OF BOSTON

Findings, and Order for Judgment.

In this petition for injunctive and declaratory relief, petitioners, patrolmen in the Boston Police Department and also officers in the Boston Police Patrolman's Association, Inc. (Association), are seeking to determine whether the respondent Police Commissioner can require petitioners to provide certain information along guidelines in "Exhibit A" appended to the petition. A preliminary injunction issued under prayer 2 of the petition on May 29, 1974 (Zarrow, J.). Trial was held on June 10, 1974. It was stipulated by the petitioners and re-

spondent that the decision of the Court would bind all other patrolmen who are members of the Association and who have received requests to make reports.

Petitioners' witnesses were patrolmen Chester J. Broderick and John F. Bilodeau. The parties stipulated in open court that the testimony of the third petitioner, patrolman Paul J. Whelan, would be substantially the same as that of Broderick and Bilodeau. The respondent's only witness was Deputy Superintendent of the Boston Police Department, John E. Barry.

The petitioners with other members of the Association attended a Law Day celebration in Newport, Rhode Island during the weekend of May 10, 1974. The total number of patrolmen who attended was about ninety (90) officers. The celebration was arranged by the Newport Police Association who, in addition to the officers of the Boston police department, also invited police officers from other police departments. The respondent was told of the invitation and gave his permission to the officers to take four Boston Police Department motorcycles along for use in a parade scheduled for May 11, 1974.

The three petitioners and the other police officers traveled to Rhode Island, either by private car or by bus paid for by the Association. For example, Broderick went in a bus and Bilodeau traveled by private vehicle. The living accommodations at the Ramada Inn were paid by the host, the Newport Police Association, and the petitioners and the other police officers were not compensated for the trip in any way by the Boston Police Department.

The petitioners were in an off-duty status at the time of their trip, carried no weapons and wore their police uniforms only for the parade on May 11, 1974. There was no evidence that the other police officers carried weapons or wore their uniforms other than at the parade.

On Saturday, May 11, 1974, the petitioners and the other police officers, in uniform, marched in the parade with other groups (American Legion, Veterans, Scouts) and were accompanied by the Boston Police motorcycles. The Boston contingent carried a City of Boston flag, a Massachusetts flag, and the banner of the Association.

Shortly after the weekend, respondent di Grazia received complaints about the conduct of the Boston police officers in Rhode Island. He assigned Deputy Superintendent Barry, Commander of the Internal Affairs Division of the Boston Police, to investigate the complaints. Deputy Superintendent Barry received 15 or 16 complaints from employees of the Ramada Inn and from other persons regarding the conduct of Boston police officers at the inn and in the parade. One written complaint, under pains of perjury, was filed by the manager of the Ramada Inn, one Peter Stilphen.

Stilphen's statement to the Internal Affairs Division was substantially as follows: Stilphen had received a complaint from a customer at the inn that the latter had been punched while playing pool in the bar area and that his cue stick had been taken from him. When the customer pointed out to Stilphen the person who had committed the acts, Stilphen recognized the alleged assailant as a Boston police officer. Stilphen observed between 15 and 20 police officers in the swimming pool area, "diving and playing in the pool in the nude, screaming and yelling like a bunch of wild kids." Later in the evening, Stilphen observed three males walking nude in the hotel lobby and in the swimming pool area. Several nude officers were helping another nude male who had cut his foot on glass dropped near the pool. One of the maids was later "grabbed" by a male whom Stilphen later identified from the Boston police photo book. During the early morning hours, officers were using foul language and were noisy in the hall upstairs. The Portsmouth police were called and quieted the area. Early

in the morning of May 11, Stilphen was awakened by what he believed were gun shots. On investigating, he observed firework paper in the hall and brown marks on one of the doors. Stilphen later learned that a liquor storage cabinet had been broken into and five quarts of liquor were taken. Some guests left the inn without paying for breakfast.

Deputy Superintendent Barry also received complaints regarding police misconduct during the parade, and in particular, regarding the officers operating the motorcycles. As a result of the complaints, Deputy Superintendent Barry began an investigation in order (1) to ascertain how many officers were at the Ramada Inn in Rhode Island, (2) to ascertain how many of the police officers present in Rhode Island were on an off-duty status, (3) to investigate the allegations of misconduct. The investigation included interviewing witnesses in Rhode Island, examining hotel and other records, and identification of officers involved through photographs. Reports were received from state and local police in Rhode Island. At the conclusion of the first phase of his preliminary investigation, Deputy Superintendent Barry still did not know the number of police officers present nor their status in Rhode Island.

A questionnaire was prepared (Exhibit A attached to the petition) in which the petitioners and other police officers were asked to give a narrative report of their stay in Rhode Island. The questions were to be used as a guideline by the officers in writing the report. The questionnaire noted that anything said in the report would not be used against the officer in a criminal proceeding. About 140 questionnaires were distributed to officers, generally to those who were listed on the records of the Boston Police Department as being absent from the roster of the Department on the days in question. A copy of Stilphen's complaint was attached to the questionnaire.

Petitioners and other police officers receiving the questionnaire were ordered by their superior officers to submit their

report within a day, and if they failed to do so, they would be subject to disciplinary action. The petitioners refused to comply citing as their reason, among others, that the respondent had no right to investigate their off-duty activities. An administrative appeal to the respondent was denied.

Based on the above findings of fact, the Court makes the following rulings and order:

1. The Court finds that in the context of the complaints made regarding off-duty police conduct, the report ordered by the respondent of the petitioners and other police officers is reasonable and within the respondent's authority.

If the allegations contained in the complaints are true, the conduct of the officers involved was highly improper, if not criminal. See *Seattle Police Officers Guild* v. *City of Seattle*, 80 Wash. 2d. 307, 494 P. 2d. 485. In that case the Court stated:

> "A police department is a highly sensitive agency entrusted and charged with the duty of protecting the community it serves from the evils of crime and corruption. To efficiently and effectively accomplish its mission it requires the respect and regard of the public, and when it has reason to believe that some of its members may be engaging in disreputable practices, it has a valid interest in purging itself of such practices through internal departmental procedures and the right to require the full cooperation of its membership to this end."

The respondent was the recipient of a number of complaints in regard to the conduct of police officers in their off-time. The complaints were detailed except for the specific identity of

the alleged offenders. The complaint of Stilphen alleges misconduct that at the least, if true, brings into question the character and judgment of the alleged offenders. Every hour of every day, an on-duty police officer must make important decisions involving the life and security of fellow citizens. In making these decisions, his character and judgment play an integral role. Therefore the Court finds and rules that the order of the respondent as to the off-duty conduct of the petitioners and other police officers bears a reasonable relationship to the petitioners' and the other police officers' fitness or capacity to properly function as an on-duty police officer.

Statute 1962, Chapter 322, Section 11 gives to the respondent the authority to administer the Boston Police Department.

2. The Court finds that the respondent's order for a report of the events occurring in Rhode Island is constitutional under *Gardner* v. *Broderick*, 392 U.S. 273 (1968). The questions that were to be used by the petitioner and other police officers as guidelines in making the narrative report are specific, direct, and narrowly relate to the alleged misconduct. In addition, the respondent's order involves a preliminary investigation in order to determine whether further action should be taken on the complaints. The questions do not require the petitioners to waive their privilege against self-incrimination and the order of the respondent specifically excludes the reports being used in any criminal proceeding.

3. The Court further finds that the terms "nudity," "obscene language" and "vandalism" as used in the complaint of Stilphen and referred to in respondent's order are not vague and indefinite in the context of this case.

4. The Court further finds that the respondent's order does not violate any rights of the privacy petitioners and other policemen may have under the law.

Therefore, it is ordered that the preliminary injunction dated May 29, 1974 be dissolved forthwith.

Let Judgment be entered in accordance with the foregoing.

KENT B. SMITH,

Justice of the Superior Court.

Entered July 8, 1974.

Appendix B.

COMMONWEALTH OF MASSACHUSETTS.

SUPREME JUDICIAL COURT.

CHESTER J. BRODERICK & OTHERS

vs.

POLICE COMMISSIONER OF BOSTON

HENNESSEY, J. This is an appeal by the plaintiffs, who are police officers in the city of Boston, from a declaratory judgment entered by a Superior Court judge declaring, in essence, that the officers must provide written answers to a number of written questions addressed to the officers by the defendant, who is the police commissioner of the city of Boston (commissioner). After the appeal was entered in the Appeals Court, the case was transferred to this court on our own motion. We affirm.

On Friday, May 10, 1974, approximately ninety off-duty Boston police officers journeyed to Newport, Rhode Island, to participate in what was planned as a Law Day celebration. The celebration was to take place over the weekend, the main event scheduled being a parade on Saturday wherein the officers were to march as a contingent representing the city of Boston, along with units from several other States and cities. Arrangements had been made for the celebration by the members of the Newport police association. It was planned that the Boston police officers would spend Friday evening at the Ramada Inn in Portsmouth. The police officers arrived either by private cars or by a bus chartered by the Boston Police Patrolmen's Association, Incorporated.

Shortly after the weekend, the commissioner[1] received complaints concerning the officers' conduct at the Ramada Inn and during the parade. He assigned a deputy superintendent to investigate. During the course of his investigation, the deputy superintendent received fifteen or sixteen complaints from employees of the inn. In addition, the manager of the inn submitted an affidavit in complaint. The affidavit alleged in general: that a customer at the inn, while playing pool in the bar area, had had his pool cue snatched away in the course of which he had been punched in the chest by a person subsequently identified by the manager as a Boston police officer; that the manager had observed "15 or 20 Police Officers at one point diving and playing in the pool in the nude, screaming and yelling like a bunch of wild kids"; that the manager had seen three nude males walking about in the vicinity of the pool area and the hotel lobby; that during the night a group of men roamed about the hallways using foul and opprobrious language; that at one point during the night the manager was awakened by what he thought were gun shots which were in fact some form of fireworks; that sometime during the night the hotel liquor cabinet was broken into and five quarts of liquor were stolen; and that some guests had left the inn without paying for their breakfast. The Portsmouth police were summoned twice in the course of the evening, as well as the State police, who were called once. The deputy superintendent also received complaints regarding the conduct of the police officers during the parade, particularly with respect to those officers operating police motorcycles.

[1] Pursuant to St. 1962, c. 322, § 11, the police commissioner is charged with administration of the police department. "The police commissioner shall have cognizance and control of the government, administration, disposition and discipline of the department, and of the police force of the department and shall make all needful rules and regulations for the efficiency of said police. . . . Officers and members of said police shall, *whether on or off duty*, be subject to the rules and regulations made under this section" (emphasis supplied).

As a result of these complaints, the deputy superintendent sought to ascertain how many Boston police officers were at the Ramada Inn on the days in question; whether all of the police officers present in Rhode Island were scheduled off-duty; and he sought further to investigate the allegations of misconduct to determine whether any disciplinary proceedings were called for. After the preliminary investigation, including interviews with witnesses and the showing of photographs, was concluded, the deputy superintendent prepared a questionnaire which required certain police officers to file a narrative report of the events occurring in Rhode Island, the report to be based on the fifteen questions set forth. The questions inquired generally as to whether the officer had been registered or present at the inn; whether the officer had witnessed any events thereat; and further asked specific questions relating to the activities at the parade.

The questionnaire was submitted to the commanding officers of the various precincts with a directive that it be distributed to those police officers who were listed on the records of the Boston police department as being absent from the duty roster on the days in question. The order to submit a report based on the questions stated, "It is brought to the attention of all officers concerned that, in accordance with 'Silverio vs. Municipal Court of Boston' 355 Mass. 623 [1969] and 'Gardner vs. Broderick' 392 U.S. 273 [1968], when a member of the department is complained against and is directed by his commanding officer to submit his report relative to such complaint, he is required to comply."

On receipt of the questionnaires, the plaintiffs brought suit for declaratory relief (G. L. c. 214), to determine whether they were under any legal duty to respond to the questionnaire. In addition to a declaration of rights the relief sought

was an injunction prohibiting the commissioner from ordering the plaintiffs to provide the information requested in the questionnaire.[2]

The legal grounds urged by the plaintiffs are that the questionnaire inquired as to "off-duty noncriminal conduct" and is therefore violative of rights guaranteed by our State and Federal Constitutions, and further that the questionnaire was in violation of St. 1973, c. 941, inserting G. L. c. 214, § 1B, which guarantees a right of privacy.

A preliminary injunction was issued by order of a Superior Court judge on May 29, 1974. Trial was held in the Superior Court on June 10, 1974. The judge found that the order to submit the report "is reasonable and within the respondent's authority" and further found "that the order of the respondent as to the off-duty conduct of the petitioners and other police officers bears a reasonable relationship to the petitioners' and the other police officers' fitness or capacity to properly function as an on-duty police officer." The trial judge ordered the preliminary injunction dissolved.

The often quoted epigram by Mr. Justice Holmes written in an opinion of this court, *McAuliffe* v. *Mayor & Aldermen of New Bedford*, 155 Mass. 216, 220 (1892), to the effect that a police officer "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman," is, as far as it goes, a correct statement of the law. *Boston Police Patrolmen's Assn. Inc.* v. *Boston*, Mass. (1975).[a] *O'Hara* v.

[1] The plaintiff Broderick is chairman of the Boston Police Patrolmen's Association; the plaintiff Bilodeau is vice-chairman of the association, and the plaintiff Whelan is the secretary of the association. All three men are Boston police patrolmen. It has been stipulated by the plaintiffs and the defendant that the decision in this case would bind all other patrolmen who are members of the association and who have received orders to make reports.

[a] Mass. Adv. Sh. (1975) 979.

Commissioner of Pub. Safety, Mass. (1975).[b] *United States Civil Serv. Commn.* v. *National Assn. of Letter Carriers, AFL-CIO*, 413 U.S. 548 (1973). *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973). However, that statement is tempered by the principle that public employment may not "be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action." *Keyishian* v. *Regents of the Univ. of the State of N. Y.* 385 U. S. 589, 605 (1967).

The issue presented here is whether the questionnaire as drawn infringed either the plaintiffs' constitutional or statutory rights. While resolution of this issue at first glance appears to involve the Fifth Amendment to the United States Constitution's privilege against self-incrimination, closer anaylsis reveals that this constitutional right is only tangentially involved, the more pertinent inquiry here being whether the substance of the inquiry bears a rational connection either specifically to the officer's direct performance of official acts, or generally to the officer's fitness and ability to serve in governmental service.

That requiring the plaintiffs to answer the inquiries directed to the activities in Rhode Island does not infringe their Fifth Amendment rights is made clear by the decision of the United States Supreme Court in *Gardner* v. *Broderick*, 392 U.S. 273 (1968), a case almost directly in point to the issue we consider here. In the *Gardner* case the court stated that "[i]f appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, . . . the privilege against self-

[b] Mass. Adv. Sh (1975) 990.

incrimination would not have been a bar to his dismissal."[3] *Id.* at 278. Accord, *Silverio* v. *Municipal Court of the City of Boston*, 355 Mass. 623 (1969). See generally, *Beilan* v. *Board of Educ., Pub. Sch. Dist. of Philadelphia*, 357 U. S. 399 (1958); *Lerner* v. *Casey*, 357 U. S. 468 (1958); *Faxon* v. *School Comm. of Boston*, 331 Mass. 531 (1954). But see *Slochower* v. *Board of Higher Educ. of New York City*, 350 U. S. 551 (1956); *Opinion of the Justices*, 332 Mass. 763 (1955). As we stated in the *Silverio* case, *supra*, at 629: "[A]n employee knows that if he fails to divulge information pertinent to the issue of his use or abuse of his public trust he may lose his job. The fact of employment poses the continuing choice of whether to divulge such information. The Constitution of the United States, however, as we understand its construction, does not require that a public employer continue to employ in a position of public trust an employee who declines or renders himself unable to perform the duties of his position on the ground of the constitutional protection against self-incrimination."

The plaintiffs rely heavily on the above quoted language in the *Gardner* case. They argue that the questions contested herein sought to inquire as to off-duty conduct of the officers while in Rhode Island, and that therefore the questions do not specifically, directly, and narrowly relate to the performance of official duties and, as the plaintiffs characterize the situation, "It is as though, for instance, the petitioners were on vacation." Alternatively, the plaintiffs argue that, even if the commissioner has a right to inquire into off-duty conduct, that right is contingent on the commissioner (1) addressing his inquiry exclusively to officers shown to be involved, (2) affirmatively demonstrating, before any response is required, that the conduct to be investigated directly affects the officer's public employment. We disagree.

[3] Having determined that a refusal to answer relevant inquiries might be grounds for dismissal from public service, the question arose whether evidence obtained under threat of dismissal could constitutionally be used in subsequent criminal proceedings. The case of *Garrity* v. *New Jersey*, 385 U.S. 493 (1967), held that it could not. The questionnaire in this case strictly adhered to the requirements of the *Garrity* case by providing that "anything the officer relates concerning the charge against him cannot be used in evidence in a criminal court."

Contrary to the plaintiffs' contention, we do not read *Gardner* v. *Broderick*, *supra*, as limiting the scope of inquiry to matters occurring while on duty. The far more logical reading of the language in the *Gardner* case is that the inquiry must not be general and exploratory in nature but must be limited to the specific infraction under investigation. Thus the State without more could not generally inquire whether a State employee did or did not claim his privilege against self-incrimination in an independent proceeding and therefrom infer guilt. *Confederation of Police* v. *Conlisk*, 489 F. 2d 891 (7th Cir. 1973), cert. den. sub nom. *Rochford* v. *Confederation of Police*, 416 U. S. 956 (1974). Nor should the State phrase general and vague questions in a broad dragnet approach.

The crucial phrase in the *Gardner* quotation is "*relating to* the performance of his official duties" (emphasis supplied). "Relating to" implies more than matters taking place on duty; we think it extends to matters *of and concerning* an individual's fitness for public service. We decline to hold that the commissioner must close his eyes to what might constitute outrageous, even illegal, conduct on the part of police officers under his command on the principle that the conduct took place when the officer was off duty.

However, we need not decide this case exclusively on the on-duty/off-duty dichotomy because we perceive the conduct at issue here to have undertaken under sufficient banners of officialdom to take it outside the pale of purely private conduct.

It is true that the plaintiffs were off duty, carried no weapons, wore their uniforms only in the parade (although they had the uniforms on when they left the inn for the parade), and were not compensated for their time spent in Rhode Island. On the other hand, the police officers were invited to Rhode Island for the purpose of representing the Boston Police Department; they were to march in the parade in the uniform of the Boston police. Arrangements for a bus to Rhode Island and payment therefore were made by the Boston Police Patrolmen's Association. Arrangements for the police officers while in Rhode Island were made by the Newport police association, and the latter association paid for the accommodations at the inn. Apparently the reservations at the inn were made for the police officers as a group. On their arrival the officers did not register by individual name; rather one officer signed for the two or three officers occupying each room. Thus the rooms at the inn were in a sense registered to the officers as a group of Boston police officers and not as individual persons. The officers had requested that they be allowed to use four Boston police department motorcycles in the parade; the plaintiff Broderick spoke with the commissioner who granted permission to use the motorcycles subject to the posting of a bond. Further, and of some importance, the police officers while marching in the parade not only wore the uniform of the Boston police department, but displayed and marched under the Boston police department flag, the city of Boston flag, the

Commonwealth of Massachusetts flag, and the banner of the Boston Police Patrolmen's Association.[4]

This conduct is something more than purely private activity. Because of our conclusion that this activity was undertaken under a cloak of officialdom, we are not drawn into questions relating to purely private conduct. However, we agree with the trial judge that, even if this investigation could be described as concerning conduct more private than official, the inquiry would be permissible and the officers would be required to file the reports directed in the questionnaire.

It is clear that with respect to private conduct the breadth of inquiry that may be undertaken by the State as an employer would perforce seem less wide than that inquiry permitted with respect to official conduct. The problem, of course, is defining the standards to establish the limits of any inquiry into private affairs. However, no one would contend that the commissioner should not be allowed, for example, to ask questions relating to private conduct if affirmative answers to those questions would unqualifiedly be grounds for dismissal from the police force, or warrant other disciplinary action. In this regard, we have on occasion sustained the dismissal of a police officer for conduct which did not occur in the performance of his official duties, stating that "[t]he circumstance that this testimony related to a time when the officer was not in uniform and was not on duty is not decisive. His conduct while off duty and in civilian clothes might be of such nature as to show him unfit to continue to act as a police officer."

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[4] Surely the spectators watching the parade and the patrons at the inn regarded the officers as comprising a contingent of the Boston police department. The perception of the public of the police officers is not without relevance since "police morale and discipline and the public's attitude toward the police" are in a sense intricately intertwined. *Selectmen of Framingham* v. *Civil Serv. Commn.* Mass. , (1974) (Mass. Adv. Sh. [1974] 2389, 2400).

Mayor of Medford v. *First Dist. Court of E. Middlesex*, 249 Mass. 465, 470 (1924) (dismissal for improper relations with a woman not the officer's wife). *Mayor of Newton* v. *Civil Serv. Comn.* 333 Mass. 340, 343 (1955) (dismissal of police officer on charge of and arrest and conviction for intoxication). Cf. *Attorney Gen.* v. *Tufts*, 239 Mass. 458 (1921) (wrongs which render a person unfit to hold the office of district attorney need not be committed in the immediate performance of duty, but may arise wholly outside of official duties).

Even if we were to reach a different result in any one of these cases if presented with similar circumstances today, the fact remains, as these cases indicate, that official conduct is not the only area which may be a subject of inquiry. This is particularly so in the sphere of law enforcement where, as noted by the Supreme Court in the *Gardner* case, a police officer "is directly, immediately, and entirely responsible to the city or State which is his employer. . . . He is a trustee of the public interest, bearing the burden of great and total responsibility to his public employer." 392 U.S. at 277-278 (1968). In another context see *Wormstead* v. *Town Manager of Saugus*, Mass. (1975).[c]

We do not mean to imply that all aspects of a police officer's or other State employee's private life may be subject to scrutiny by his superiors. Nor may a police officer be required, on penalty of dismissal to answer every inquiry directed to his conduct while off duty. It may be that the breadth of the inquiry into private conduct is limited to matters the answer to which may be sufficient to trigger some sort of disciplinary proceedings. At that point private conduct may be deemed to have spilled over into the realm of official concern. See generally, Gunther and Dowling, Cases and Materials on

[c]Mass. Adv. Sh. (1975) 123.

Constitutional Law, 1300-1315 (8th ed. 1970). In any event an inquiry into private affairs must bear a sufficiently rational connection to the officer's position in the governmental service, in the sense that the question must be reasonably related to the officer's ability and fitness to perform his official duties. See, e.g., *Gayer* v. *Schlesinger*, 490 F. 2d 740 (D.C. Cir. 1973); *Wishart* v. *McDonald*, 500 F. 2d 1110, 1115 (1st Cir. 1974). See generally, *Seattle Police Officers' Guild* v. *Seattle*, 80 Wash. 2d 307 (1972); *Davenport* v. *Fire & Police Commrs. of Peoria*, 2 Ill. App. 3d 864 (1972); *Riley* v. *Police Commrs. of Norwalk*, 147 Conn. 113 (1960); *Matter of Appeal of Emmons*, 63 N.J. Super. 136 (1960).

Having determined that the activities in Rhode Island were a proper subject of official inquiry we turn now to the determination whether the questions were sufficiently, narrowly and directly related to the specific matter under investigation. We think that the questionnaire meets these criteria. The questions asked were directly and factually related to events occurring at the inn and the parade; they were designed to aid in the writing of a narrative report by the officers involved.

The plaintiffs contend, however, first, that since the questionnaire was directed to all of the approximately 140 officers listed as absent from the duty roster, some of whom were not in Rhode Island the questionnaire was not properly limited and constituted a fishing expedition. Second, the plaintiffs contend that before an officer may be required to answer a questionnaire of this type, the commissioner must affirmatively demonstrate that the activity to be investigated "affected . . . [the officer's] public employment in some way."

With respect to the first argument, it is our opinion that the order was as narrowly limited as it reasonably could be. Ninety officers were in Rhode Island; it would be patently absurd to say that the commissioner could not seek to identify

those ninety officers by ascertaining which of a possible class of 140 comprised that ninety.

Our discussion of the permissible breadth of inquiry above, resting as it does on the standard that the inquiry reasonably relates to the officer's ability to perform his official function, in large measure answers the plaintiffs' second contention. We think this inquiry was reasonably related to determining the judgment and "fitness" of these men as police officers. While the plaintiffs assert that no criminal charges were pressed, that is not dispositive of the issue. From the record it appears that certain of the men involved could have been charged with criminal offenses. In any event, there were complaints which tended to show that the conduct of certain of those police officers who stayed at the inn was decidedly less than the discipline and order one would expect from officers representing the Boston police department or any other. We are assured in our judgment that this was an isolated and totally unrepresentative occurrence and that not all officers present in Rhode Island participated in the activity. Nevertheless, the commissioner should be (see fn. 1) and is properly investigating the matter.

With respect to the privacy claim under G.L. c. 214, § 1B,[5] we simply state, as did the United States Court of Appeals in *Wishart* v. *McDonald*, 500 F. 2d 1110, 1113-1114 (1st Cir. 1974), "The right of privacy, even as advocated in Warren v. Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890), may be surrendered by public display."

Judgment affirmed.

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[5] General Laws c. 214, § 1B, inserted by St. 1973, c. 941, provides: "A person shall have a right against unreasonable, substantial or serious interference with his privacy. The superior court shall have jurisdiction in equity to enforce such right and in connection therewith to award damages."

Appendix C.

GUIDE FOR COMPLETING PORTSMOUTH, RHODE ISLAND REPORT

1. Were you at the Ramada Inn, Portsmouth, Rhode Island on May 10, 1974 and/or May 11, 1974?
2. Were you registered at the Ramada Inn on either or both of those dates?
3. What tour of duty, if any, did you perform on May 10, 1974 and/or May 11, 1974?
4. Referring to the signed complaint of Peter Stilphen, did you see any of the incidents described?
5. Did you participate in any of those activities?
6. Did you share a room with anyone at the Ramada Inn?
7. If so, who?
8. Did you participate in the parade?
9. If so, did you march or were you either operating or a passenger in a motor vehicle?
10. Did you operate a motorcycle in Portsmouth, R.I. on May 11, 1974?
11. If so, where?
12. If you did operate a motorcycle, who had custody of the motorcycles?
13. When did you arrive at the Ramada Inn?
14. Did you travel to or from Portsmouth, R.I., in a private vehicle or in a bus?
15. When did you leave the Ramada Inn?

It is brought to the attention of all officers concerned that, in accordance with "Silverio vs. Municipal Court of Boston" 355 Mass. 623, and "Gardner vs. Broderick" 392 U.S. 273, when a member of the department is complained against and is directed by his commanding officer to submit his report relative to such complaint, he is required to comply. In submitting his report, anything the officer relates concerning the charge against him cannot be used in evidence in a criminal court. Note the procedure indicated in the Rules and Regulations of the Police Department of the City of Boston, Rule 54, section 15d.

Your report should be complete in every way and although the above questions must be answered they are submitted as a guide to assist you in writing your report.

BOSTON POLICE DEPARTMENT

Internal Affairs Division -- Statement of Complainant

Name Peter Stilphen Address 144 Anthony Rd., Portsmouth, RI Tel. 683-3600

D.O.B. 9-1-39 Marital Married Employment Owner of the Ramada Inn Tel. 683-3600

Reported to Sgt. J.F. Chalpin Date of Report 5-14-74 Case # _____

Specific Complaint Nudity, vandalism, obscene language

Details- About 5:00 P.M., Friday, May 10, 1974, I was in the area, lobby, when two buses showed up and about 80 Police Officers came in to register. This took about one half hour and they were Boston Police Officers checked into the second floor 200 series rooms. When they had gotten off the bus they were loud and had cans of beer coming into the lobby. Particularly in the lounge area the language wasn't the best. They floated between the lounge and night club. When the New York Police contingent arrived permission was given to march through the night club, this was about midnight, Friday, May 10, 1974. They marched through and then went to their rooms on the first floor area in the 100 series rooms.

About this time I was in the night club-swimming pool area and when a regular customer came up to me and stated he had been punched in the chest and his cue stick taken from him when he had been playing bumper pool in the back bar area. When I asked to point the man out he did and I knew it was one of the Boston Police Officers who had checked in and I apologized to him and didn't want an incident because of it. This incident then was dropped and then I observed 4 or 5 at first, Police Officers, then 15 or 20 Police Officers at one point diving and playing in the pool in the nude, screaming and yelling like a bunch of wild kids. The lights were out and I think I went to the Officer on duty and got him to keep the disturbance down and try to get these guys out of the

This statement is true to the best of my knowledge or belief and is made under the pains and penalty of perjury. Pg. 1 of 5 Pgs.

Signature _____ Date _____

BOSTON POLICE DEPARTMENT

Internal Affairs Division -- Statement of Complainant

Name _____ Address _____ Tel. _____

D.O.B. _____ Marital _____ Employment _____ Tel. _____

Reported to _____ Date of Report _____ Case # _____

Specific Complaint _____

Details- pool and others from jumping in the pool.

At this time in time, I was floating between the pool, night club, lounge, lobby, keeping my eyes on things.

When in the lobby about 12:30 or 12:45 A.M., 5-11-74, I observed 3 males nude walking from the swimming pool into the lobby. One of them, the first one, had a hat on, a felt hat type. I had run after Bruce after I got over the shock of seeing them to get them out of the lobby and he got them out after about 15 or 20 seconds. They left to go back to the swimming pool area.

From about 1:00 A.M., 5-11-74, they were in the swimming pool and I passed one male nude who had cut his foot. I had seen a clothed male drop the glass near the fence gate between the pool and the Club Bar. Several of the nude officers were trying to take care of the cut foot. He disappeared from the scene.

Until closing about 2:00 A.M., 5-11-74, and when one of the bar maid's, Liz Jordan, was grabbed by a heavy built Police Officer, I picked his photo out of the Boston Police Department Photo Book, by both arms and he said something to her and she answered him and he shoved her away from him. She continued out on her way home.

We closed the bar at 2:00 A.M., 5-11-74, and it took about one half hour to clear the area. Police Officer Bruce McAskill checked the

This statement is true to the best of my knowledge or belief and is made under the pains and penalty of perjury. Pg. 2 of 5 Pgs.

Signature _____ Date _____

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BOSTON POLICE DEPARTMENT

Internal Affairs Division -- Statement of Complainant

Name _____ Address _____ Tel. _____

D.O.B. _____ Marital _____ Employment _____ Tel. _____

Reported to _____ Date of Report _____ Case # _____

Specific Complaint _____

Details- club area and told me everyone was out. We secured the doors and the exterior doors had their alarm on. (They're always on.)

I checked the lounge and several employees were still there and I instructed them and the desk clerk, Ray Arugo, to make sure the doors were secured.

Came upstairs to my room # 208 and found the hallway crowded with police officers using foul language, making loud noise and goofing off. I told them that my wife and 2 children were in these two rooms and to quiet down. They continued making noise and I called the Portsmouth Police and 2 Officers responded. They asked the officers to please go into their rooms and they all did except for 2 or 3. I went to the conference room with the Portsmouth Police and observed the surveillance camera was partially off mount and twisted around. One of the officers said, "fag", when I was about 10' away. I asked for who said it but no one owned up and another older officer said he didn't mean that. I went back to my room, the noise was just as bad, I again called the Portsmouth Police and told them if they didn't send a cruiser down I would call the State Police and have them emptied out. During this time my wife and 3 children were awake because of the noise. The State Police showed up, because Portsmouth Police were unavailable, and talked with somebody in the lobby and I believe they talked with the Boston Police Officers and then it quieted down.

This statement is true to the best of my knowledge or belief and is made under the pains and penalty of perjury.

Signature _____ Date _____

BOSTON POLICE DEPARTMENT

Internal Affairs Division -- Statement of Complainant

Name _____ Address _____ Tel. _____

D.O.B. _____ Marital _____ Employment _____ Tel. _____

Reported to _____ Date of Report _____ Case # _____

Specific Complaint _____

Details- I believe a few of them, a little after 4 A.M., about 6 of them wanted to go swimming and the Troopers then came in and put a stop to the noise and all and I apparently dozed off.

I was awakened about 6:30 AM or 7:00 AM, 5-11-74, with what sounded like gun shots and when I looked out at the second volley, I observed what looked like firework paper all over the hall, and a mark, a burn, on the door I believe to Room # 211. A man was running around the hallway banging on doors, including mine, saying, "Get the F--- up you drunks!" Someone came through banging a drum.

I got a telephone call at about 7:30 AM from the desk clerk stating we had a Breaking and Entering in the Liquor storage cabinet located in one of the bars in the night club. Portsmouth Police were notified and they had a State Trooper show up and we went to see what was missing. It looked like 5 quarts of liquor, unknown brands had been taken. The Trooper made out his report and I went to the front desk as the officers were starting down were in uniform for the parade.

One or two of the waitresses came out and asked for fellows that had eaten breakfast and gone without paying. I couldn't find them from the poor descriptions they gave.

The Officers got onto the buses and the motor cycles were taken out of the truck. There were at least four cycles.

This statement is true to the best of my knowledge or belief and is made under the pains and penalty of perjury.

Signature _____ Date _____

BOSTON POLICE DEPARTMENT

Internal Affairs Division -- Statement of Complainant

Name _____ Address _____ Tel. _____

D.O.B. _____ Marital _____ Employment _____ Tel. _____

Reported to _____ Date of Report _____ Case # _____

Specific Complaint _____

Details- All the rooms were billed to Portsmouth Police Dept. Signed in by one officer with the names of other officers in the room with him.

There were no checks or credit cards used.

There were no families, maybe one or two girlfriends.

I picked out some of the officers that were here and any that gave us trouble I made a remark and Detective Maraggia made a notation.

I talked with a Police Officer who was in the lobby on the telephone and I questioned him as to any Sergeants or Lieutenants in charge and he said, "No we're all Patrolmen and no one is in charge. We're all the same", he said.

This statement is true to the best of my knowledge or belief and is made under the pains and penalty of perjury.

Signature _____ Date _____

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